

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**DENNIS FITTS,**

**Petitioner,**

**No. 10-00494-DRH -DGW**

**JACQUELINE LASHBROOK<sup>1</sup>,**

**Respondent.**

**MEMORANDUM and ORDER**

**HERNDON, District Judge:**

Pending before the Court is Fitts' second motion to proceed in *forma pauperis* on appeal (doc. 42) and second motion for certificate of appealability (doc. 43). On September 26, 2013, the Court denied and dismissed Fitts' 28 U.S.C. § 2254 petition with prejudice (doc. 21) and the Clerk of the Court entered judgment (doc. 22). On October 23, 2013, Fitts filed his original notice of appeal (doc. 23) along with his original motion for certificate of appealability (doc. 24). On October 31, 2013, the Court declined to issue a certificate of appealability, (doc. 27), finding that Fitts could make no substantial showing of a denial of a constitutional right as the non-procedurally defaulted claim was "not debatable among jurists of reason." On May 13, 2014, the Seventh Circuit Court of Appeals, construing it as an application for certificate of appealability, denied Fitts' original notice of appeal (appellate case no. 13-3433) and issued its mandate on June 4, 2014. See doc. 39.

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<sup>1</sup> Jacqueline Lashbrook, as the current Warden at Menard Correctional Center, has been substituted above as the proper respondent.

No further activity occurred in the district court's docket or the appellate court's docket until February 8, 2018, when petitioner Fitts filed his current notice of appeal and the aforementioned second motions for leave to appeal in *forma pauperis* and for issuance of a certificate of appealability<sup>2</sup>. Based on the following, the Court **DENIES** the motion to proceed in forma pauperis on appeal (doc. 42) and **DENIES as moot** the motion for certificate of appealability (doc. 43).

According to 28 U.S.C. § 1915(a)(3), “[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” *Id.* To determine that an appeal is taken in good faith, the Court “need only find that a reasonable person could suppose that the appeal has some merit.” *Walker v. O’Brien*, 216 F.3d 626, 632 (7th Cir. 2000) (citing *Lee v. Clinton*, 209 F.3d 1025, 026 (7th Cir. 2000)). No reasonable person could reach the conclusion that the appeal is taken in good faith as the Court has already found one of Fitts’ claims to be procedurally defaulted and the other to be meritless. Additionally, this is petitioner Fitts’ second appeal from the same Order.<sup>3</sup> This second appeal, opened under case no. 18-1329 in the Seventh Circuit Court of Appeals, is

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<sup>2</sup> After review of the motion for certificate of appealability (doc. 43), it is possible that petitioner Fitts believes he has filed a successive section 2254 petition, opposed to an appeal of the district court’s Order denying his original 2254 petition. Regardless of if that is true, petitioner has not followed the procedure dictated by 28 U.S.C. § 2244 for filing a successive section 2254 petition, in that Fitts has not presented a new rule of constitutional law or new facts underlying his case nor has he sought an order from the appropriate court of appeals authorizing the district court to consider the second application. See 28 U.S.C. § 2244 2(A) and (B) and. § 2244 3(A).

<sup>3</sup> As an aside, petitioner Fitts never filed a petition for writ of certiorari following the denial of his first appeal, which would have been the proper path of recourse.

extremely untimely. As the Seventh Circuit has already stated in an Order directed to petitioner to show cause why his appeal should not be dismissed for lack of jurisdiction<sup>4</sup>: “In this case judgment was entered on September 26, 2013, and the notice of appeal (petitioner’s second in this case – *see* Appeal No. 13-3433) was filed . . . well over four years late.” *See* appeal no. 18-1329, doc. 2. This Court did not grant any extension for the appeals period under Federal Rule of Appellate Procedure 4(a)(5), nonetheless grant an extension that has lasted for years.

Accordingly, it is **HEREBY ORDERED** that Fitts’ motion for leave to proceed in *forma pauperis* (doc. 42) is **DENIED**. Petitioner Fitts shall tender the appellate filing and docketing fee or may reapply with the Seventh Circuit Court of Appeals for leave to proceed in *forma pauperis* on appeal, pending the outcome and direction of the Seventh Circuit Court of Appeals based on any briefing submitted on behalf of Fitts’ untimely second notice of appeal. Lastly, the Court **DENIES as moot** the motion for certificate of appealability (doc. 43) as the Court previously declined the certificate.

**IT IS SO ORDERED.**

  Judge Herndon  
2018.02.27  
14:59:44 -06'00'  
**United States District Judge**

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<sup>4</sup> Per the Seventh Circuit’s Order, petitioner Fitts has until March 1, 2018 to file any briefing to support why his second appeal should not be dismissed by the appellate court. Until then, briefing is suspended in that court.